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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1174 62

THE EAST NEW YORK SAVINGS BANK,
Appellant,

vs.

ALVIN HAHN AND HANNAH HAHN

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

JOHN P. MCGRATH,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1174

THE EAST NEW YORK SAVINGS BANK,
Appellant,

against

ALVIN HAHN AND HANNAH HAHN, HIS WIFE
Appellees

STATEMENT AS TO JURISDICTION

The case is one in which the validity of a statute of the State of New York, to wit, Chapter 93 of the Laws of 1943 of the State of New York, which statute was approved by the Governor of the State of New York, is drawn in question upon the ground that the statute violates section 10, Article 1 of the Constitution of the United States, and violates section 1 of the Fourteenth Amendment of the Constitution of the United States. The final decision of the Court of Appeals of the State of New York, that being the court of last resort in which a decision could be had in this case, is in favor of the validity of said statute. Therefore, in accordance with the Rules of the Supreme Court of the United States (Rule 46, par. 2; 28 U. S. C. A., Section 354), the petitioner respectfully shows to this Court that the case is one in which, under the legislation in force when the Act of January 31st, 1928 (45 Stat. L. 54) was passed, to wit, under section 237-a of the Judicial Code (28 U. S. C. A., Section 344), a review can be had in the Supreme Court of the United States as a matter of right, on writ of error.

The statute, the validity of which is involved, is Chapter 93 of the Session Laws of 1943 of the State of New York. It is a re-enactment and extension of Chapter 793 of the Session Laws of 1933 of the State of New York, commonly known as the "Mortgage Moratorium Law of the State of New York", which became law on the 26th day of August, 1933. Section 2 of said Chapter 793 of the Laws of 1933 amended the Civil Practice Act of the State of New York by inserting therein a new section, numbered section 1077-a, which provided that no action or proceeding for the foreclosure of a mortgage on real property shall be maintainable solely for or on account of a default in the payment of principal of said mortgage, or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal, or instalment of principal, may be due by the terms of such agreement, bond or mortgage.

By the Laws of 1934, chapter 278; Laws of 1935, chapter 1; Laws of 1936, chapter 86; Laws of 1937, chapter 82; Laws of 1938, chapter 500; Laws of 1939, chapter 606; Laws of 1940, chapter 566; Laws of 1941, chapter 782, the application of section 1077-a of the Civil Practice Act of the State of New York was extended from year to year until July 1st, 1943. Chapter 93 of the Laws of 1943 of the State of New York further extended the application of section 1077-a of the Civil Practice Act to July 1st, 1944.

Chapter 793 of the Laws of 1933 of the State of New York, sections 1 and section 1077-a of section 2, read as follows:

> "Section 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtail-

ment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

Section 1077-a. Foreclosure for principal defaults suspended. During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act."

Chapter 93 of the Laws of 1943 of the State of New York reads as follows:

"Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred and seventy-seven-a, ten hundred and seventy-seven-b, ten hundred and seventy-seven-c, ten hundred and seventy-seven-d, ten hundred and seventy-seven-e, ten hundred and seventy-seven-f, and ten hundred and seventy-seven-g of the civil practice act, as added by chapter seven hundred and ninety-three of the laws

of nineteen hundred thirty-three, and at the time of the enactment of section ten hundred and seventy-seven-cc of the civil practice act, as added by chapter eight hundred and ninety of the laws of nineteen hundred thirty-four, having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three and eight hundred and ninety of the laws of nineteen hundred thirty-four shall, notwithstanding any provision of such chapter, remain and be in full force and effect until July first, nineteen hundred forty-four, and in conformity with such extensions, section ten hundred and seventy-seven-g of the civil practice act, as added by such chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three and last amended by chapter seven hundred and eighty-two of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

Sec. 1077-g. Mortgages not affected. The provisions of sections ten hundred seventy-seven-a, ten hundred and seventy-seven-b, ten hundred and seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f shall not apply to any mortgage or the modification or extension of any mortgage insured, or hereafter insured under the provisions of the national housing act in effect June twenty-seventh, nineteen hundred thirty-four, as said act has been or is hereafter amended from time to time or to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of section three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any installments or amortization of principal, the payment of which is provided for by extension or modification executed on or after July first, nineteen hundred

thirty-seven, nor to the mortgages so extended or modified, nor to any obligations in connection with or secured by any such mortgages. The provisions of said sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f, shall apply to the final payment of principal of the mortgages so extended or modified if all installments or amortization the payment of which is provided for by such extension or modification are made as provided for by such extension or modification.

Notwithstanding the provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-seven-e, and ten hundred seventy-seven-f, and in addition to the cases therein provided for the commencement of foreclosure actions, and not in limitation thereof, any owner or holder of a mortagage covering real property as to which there is a default in the payment of any of the principal amount thereof as provided in the instrument creating the mortgage debt or any modification or extension thereof may commence an action to foreclose such mortgage, unless the owner of the mortgaged premises shall pay the unpaid principal amount thereof at the rate of one per centum per annum. Such principal payments shall accrue from July first nineteen hundred forty-two and shall be payable on October first, ninteen hundred forty-two and quarterly thereafter.

In any action or proceeding for the foreclosure of a mortgage on real property or any interest therein or in any foreclosure under article seventeen of the real property law instituted by reason of default in the payment of installment or amortization the payment of which is provided for by such extension or modification, or by the terms of this section, if such action or proceeding has not proceeded to final judgment directing the sale of the mortgaged premises, then such action shall be dismissed and discontinued upon the

payment by any defendant to the plaintiff of the taxable costs and disbursements and the payments of such installment or amortization in default and the remedying of any other default under the terms of such mortgage or extension or modification. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred forty-four."

At the time, and following the enactment of Chapter 93 of the Laws of 1943 of the State of New York, section 1077-a of the Civil Practice Act of the State of New York, read as follows:

"Section 1077-a. Foreclosure for principal defaults suspended.

During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, or any interest therein, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment or amortization of principal secured by such mortgage, although the payment of such principal or installment or amortization of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment or amortization of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

Notwithstanding the foregoing provisions of this section, any installments or amortization of principal, or principal which, by the terms of such agreement, bond or mortgage, have become due or shall become due and

payable prior to July first, nineteen hundred thirty-four shall become and be due and payable six months after the expiration of such emergency period as now or hereafter defined or extended.

Notwithstanding the foregoing provisions of this section, any installments or amortization of principal, or principal which, by the terms of such agreement, bond or mortgage, shall become due and payable between July first, nineteen hundred thirty-four and July first nineteen hundred thirty-seven, inclusive, shall become and be due and payable one year after the expiration of such emergency period as now or hereafter defined or extended."

Section 1077-a of the Civil Practice Act still continues in force in the State of New York, as hereinabove set forth, except that by Chapter 562 of the Laws of 1944 the application of said section 1077-a was extended and renewed to July 1st, 1945, and the provision requiring the payment of one percent annual amortization, as set forth in Chapter 93 of the Laws of 1943, was modified so as to require two per cent annual amortization of the mortgage principal.

The Court of Appeals of the State of New York rendered its decision herein on December 30th, 1944, in an opinion by the Hon. Irving Lehman, concurred in by five of the seven Justices of the court. The seventh Justice, Hon. Edmund H. Lewis, dissented in a separate opinion. Copies of said opinions are appended hereto. The decision and the opinion of the Court of Appeals of the State of New York is reported in 293 New York 218, —— and affirms the judgment of the Supreme Court of the State of New York, Kings County, dismissing the complaint of the appellant at the end of its case. The opinion of the Supreme Court of the State of New York was written by Hon. Joseph Fennelly, a copy of which opinion is appended hereto.

The order and judgment of affirmance, dated December 30th, 1944, by the Court of Appeals of the State of New

York, and the remittitur were filed in the office of the clerk of the Supreme Court of the State of New York, Kings County, on February 13th, 1945. The order of the Court of Appeals of the State of New York affirming the judgment of the lower court which forms part of the remittitur contains the following words:

> "Questions arising under the Constitution of the United States were presented and necessarily passed upon by this Court. The appellant contended that Chapter 93 of the Laws of the State of New York for the year 1943 violated Section 10 of Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States. This court held that the above mentioned Chapter of the Laws did not violate either of those Sections of the Constitution of the United States,—and that the legislation was valid.—"

An order was duly made by the Supreme Court of the State of New York, Kings County, on February 13th, 1945, making the order of affirmance and the judgment of the Court of Appeals of the State of New York, the order and judgment of the Supreme Court of the State of New York, the judgment having been entered in the office of the clerk of the Supreme Court, Kings County on February 26th, 1945.

The petition for appeal is presented March 7th, 1945.

The appellant, in its complaint, sued the appellees to foreclose a mortgage held by the appellant secured by property owned by the appellees. The mortgage is not in default except as to the principal amount which became due April 1st, 1924, and has not been extended The appellant contended that the moratorium law at the time the action was commenced on March 27th, 1944, prohibiting foreclosure of its mortgage solely for default in the payment of principal, was unconstitutional and invalid. The complaint, paragraphs Tenth to Nineteenth, inclusive, contains allegations to the effect that the emergency which originally

justified the New York State Legislature in enacting the mortgage moratorium in 1933, had long since ceased to exist and that the renewal of the moratorium legislation, as embodied in Chapter 93 of the Laws of 1943 of the State of New York, is an unwarranted and unlawful impairment of the obligation on contracts, in violation of section 10, Article I, of the Constitution of the United States and a deprivation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. These allegations were placed in issue by the denial of the appellees. This was the sole question presented for decision in the lower court and in the Court of Appeals of the State of New York.

The Supreme Court of the United States has jurisdiction to review the decision appealed from. In *Home Building & Loan Association* v. *Blaisdell* (290 U. S. 398) this jurisdiction was exercised under similar circumstances.

JOHN P. MCGRATH,
Attorney for Appellant.

APPENDIX "A"

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY

Special Term—Part III

THE EAST NEW YORK SAVINGS BANK, *Plaintiff*,

against

ALVIN HAHN, HANNAH HAHN, HIS WIFE, et al., *Defendants*

The New York Law Journal—August 1st, 1944

By Mr. Justice FENNELLY

East N. Y. Sav. Bank v. Hahn—This is an action commenced by the plaintiff on March 27, 1944, to foreclose a mortgage upon real estate. The only default is as to the principal amount, which became due April 1, 1924, and has not been extended. Interest, taxes and the amortization as provided by chapter 93 of the Laws of 1943 have been paid. It is the plaintiff's contention that this latter enactment, that extended the mortgage moratorium and which covered this mortgage was invalid and unconstitutional at the time it became a law, or at any rate at the time of the commencement of this action.

If plaintiff is correct in its position, judgment of foreclosure must be granted.

The legislation attacked impairs the obligations of the mortgage contract. It can only be sustained as a proper exercise of the police power, if the emergency which originally called the mortgage moratorium into being in 1933 existed at the time of its enactment and at the time of the commencement of this action and that the emergency was a temporary one. At the time of the 1943 renewal of the moratorium legislation which extended it to July 1, 1944, the legislature made the finding that in its judgment, the public emergency of 1933 still continued and existed. It provided for an amortization of 1 per cent. (Subsequently the 1944 Legislature in again renewing for a

year the Mortgage Moratorium Law, provided for an amortization of 2 per cent.) The question of whether or not these amortization provisions to alleviate the situation of mortgagees kept pace with improvement in conditions, is not before the court and no observation will be made thereon.

While great respect must be given the legislative declaration of the continued existence of the emergency, the question of whether it still existed, is always open to judicial inquiry (Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U. S. 398).

A careful and exhaustive preparation of this case has been made by plaintiff's counsel. It is shown that there are ample funds available for mortgage investment. As of January 1, 1944, the amount invested by savings banks in mortgages in New York State was slightly less than $3,000,000,000, and there was available for mortgage lending within the 65 per cent of assets limit provided by law, a sum in the excess of $1,000,000,000.

The mortgage market is, of course, inseparably connected with the real estate market. Testimony was submitted by plaintiff that can well be credited, that the real estate market in 1943 was active and gave indications of being more active in 1944. The testimony shows and it is a matter of common knowledge, that much foreclosed institutional real estate has been liquidated. For the purpose of collecting and distributing mortgage and real estate information to the savings banks supporting the service, New York State is divided into groups. Group 5 embraces Long Island and Staten Island. The chief statistician of this group prepared figures showing real estate holdings of this group that resulted from mortgage investments. The figures show that member banks in Brooklyn had an overhang of real estate as of the end of 1939 of $49,360,469; and as of January 1, 1944, of $17,105,680. In Queens the figures were (plaintiff's exhibit 6) at the end of 1939, $9,808,417; and as of January 1, 1944, $3,857,742. In Nassau the figures were at the end of 1939, $2,487,143, and as of January 1, 1944, $495,952. There is still to be liquidated and was at the time of the commencement of this action a considerable amount of real estate held by savings banks, insurance companies, Home Owners Loan Corporation and the trustees of

estates. Not until the holdings of these unwilling owners of real estate have been reduced so that they are no longer a factor in competition with the real estate of those who willingly acquired real estate and are willing but not forced to sell can it be said that there is a normal real estate market.

The Legislature had the right, in its judgment, to determine that abnormal deflation of real property values, in view of these circumstances, existed at the time it enacted the renewal legislation of 1943. This was one of the reasons upon which the original moratorium legislation of 1933 was based. The emergency, in the court's opinion, still existed at the time this action was commenced.

Plaintiff's counsel advances the argument that no alleged emergency of eleven years' duration can be considered temporary. But time is relative. The conditions which created the emergency are righting themselves. The testimony of the statistician for Group 5 shows that in this area from 1933 to 1938 foreclosures exceeded new loans and that from then on the reverse was the case. Liquidation of institutional properties has been steadily going on. The time can reasonably be foreseen when they will no longer be a competitive factor in the real estate market.

The motion made by defendant at the end of plaintiff's case to dismiss the complaint, upon which decision was reserved, is gra[illegible]ed, with an exception to plaintiff. Submit judgment upon two days' notice of settlement.

Pleadings and exhibits may be had from the clerk.

APPENDIX "B"

373—New York Opinion—(Vol. 293)—218

East New York Savings Bank, *Appellant*

v.

Alvin Hahn, et al., Respondents, et al., *Defendants*

Decided December 30, 1944

Appeal, on constitutional grounds, from a final judgment of the Supreme Court, Kings County, in favor of defendants, entered August 18, 1944, upon a dismissal of the complaint by the court on a trial at Special Term (Fennelly, J.) at the close of the plaintiff's case upon the ground that plaintiff had failed to establish that chapter 93 of the Laws of 1943 (mortgage moratorium extension) was invalid and unconstitutional at the time it became a law or at the time of the commencement of the action.

John P. McGrath, Charles H. Heinlein and John J. Buckley for appellant.

George R. Fearon for Savings Banks Association of the State of New York, amicus curiae, in support of appellant's position.

No appearance for respondents.

Nathaniel L. Goldstein, Attorney-General (Orrin G. Judd and Herbert A. Einhorn of counsel), appearing pursuant to section 68 of the Executive Law.

I. Nathanson, George A. Roland and Seymour C. Simon for Slocum Realty Corporation, amicus curiae.

Lehman, Ch. J.: The legislative declaration in Chapter 793 of the Laws of 1933 that "serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the State and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists" did not "create" a legislative power to suspend or change legal remedies of holders of

bonds and mortgages. The existence of conditions "affecting and threatening the welfare, comfort and safety of the people of the state" may, however, furnish the occasion for the exercise of such power. (Home Building & Loan Association v. Blaisdell, 290 U. S. 398; Matter of People (Title & Mortgage Guarantee Co.), 264 N. Y. 69, 94.) Concededly the existence of extraordinary conditions in 1933 as set forth in this legislative declaration and as confirmed by common knowledge, justified the extraordinary remedy that till July 1, 1934, no action should be brought to foreclose a mortgage for a default in the payment of principal. (Klinke v. Samuels, 264 N. Y. 144.) Each year thereafter the Legislature on similar findings decreed that the remedy provided in 1933 should remain in force for another year.

In 1943 the Legislature again declared that "The serious public emergency which existed at the time of the enactment of * * * chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three * * * having continued, in the judgment of the Legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three * * * shall * * * remain and be in full force and effect until July first, nineteen hundred forty-four * * *," (L. 1943, Ch. 93). The Legislature at the same time provided that an owner of mortgaged premises should not be entitled to claim the benefit of the suspension of the right to foreclose the mortgage unless he amortized the principal at the rate of one per cent per annum. The plaintiff challenges the finding of the Legislature that the "serious public emergency" which existed in 1933 still existed in 1943, and urges that the exercise of the power of the Legislature to provide an extraordinary remedy for extraordinary conditions which was justified in 1933 may not be invoked in 1943 when the abnormal conditions of an earlier time have disappeared.

The Legislature has the responsibility of determining when extraordinary conditions exist "threatening the welfare, comfort and safety of the people of the state". Within the limits of its powers as defined by the Constitution of the State and as limited by the Constitution of the United States, choice of the appropriate remedy for such

conditions is then vested in the Legislature. When the legislative choice of a remedy is challenged on the ground that it transcends the limits placed by the Constitution of the State or the Constitution of the United States upon the power of the Legislature and that it impairs the obligation of a contract or deprives a person of his property without due process of law, the legislative finding that a threatening public emergency exists is not conclusive. Judicial inquiry is not precluded whether the remedy chosen is within the power of a State Legislature "construed in harmony with the constitutional limitation on that power." (Matter of People (Tit. & Mtge. Guar. Co.), 264 N. Y. 69, 284) but upon such an inquiry the legislative findings are entitled to great weight and the legislative remedy will not be stricken down unless its invalidity is clearly established.

An extraordinary remedy which is appropriate and legitimate in an exigency resulting from abnormal conditions may be inappropriate and beyond the limits of the power of a State if temporary impairment of the obligation of a contract is continued after the exigency has passed. (Block v. Hirsh, 256 U. S. 135, 157.) When this court sustained the validity of limitation upon the remedies of the holder of a bond and mortgage created by chapter 793 of the Laws of 1933, we said that "such legislation, reasonably seeking only temporary relief, is not unconstitutional". (Klinke v. Samuels, supra; italics are new.) "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." (Home Bldg. & L. Assn. v. Blaisdell, supra, P. 442)

Doubtless such a judicial inquiry would disclose that many—perhaps all—of the adverse conditions created by the "abnormal disruption in economic processes" which, as the Legislature found, existed in 1933 and resulted in a "public emergency", disappeared before 1943. The Legislature did not, in 1943, find that these conditions still existed. It found only that the "serious public emergency" existing in 1933 and "*resulting*" from these conditions, still existed. In 1943 the fact that payrolls and savings bank deposits had increased in almost unprecedented degree was a matter of common knowledge. The Legislature could not ignore the great changes in the economic situation.

On the other hand, an accumulation of past due mortgages resulting from the ten-year-old ban upon actions to foreclose mortgages for default in the payment of principal might reasonably cause apprehension that a flood of foreclosure actions would follow removal of the ban and might itself justify a statute reasonably calculated to stem the impending flood. Reports which legislative committees made to the Legislature in 1938 and 1943 as well as a message of the Governor called to the attention of the Legislature also the fact that abnormal conditions incident to a war economy or resulting from other causes might still constitute a threat "to the welfare, comfort and safety of the people of the state" and might call for the exercise of the legislative power to provide an extraordinary remedy for extraordinary conditions.

The presumption is that the Legislature "inquired and found" that under the conditions then disclosed there was need for a continuance of the suspension of the right of holders of bonds and mortgages to foreclose for default in the payment of the principal. (Szold v. Outlet Embroidery Supply Co., 274 N. Y. 271, 278.) It is entirely unimportant whether the conditions then existing have created a new emergency, as said by the Governor in his message, or have, as the Legislature said, resulted in the continuance of an emergency itself created by conditions which have run their course. The question which the court must decide is whether the Legislature in the challenged statute has provided an appropriate remedy to tide over an exigency resulting from present conditions. We have said in an analogous case that: "Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted by the state is reasonable and legitimate." (Matter of People (Tit. & Mtge. Guar. Co.), supra, P. 94) We conclude that the challenged statute meets that test.

The judgment should be affirmed with costs.

Lewis, J. (dissenting): In this action to foreclose a mortgage on real property a challenge by a mortgagee to the constitutionality of the 1943 Mortgage Moratorium Law

(L. 1943, ch. 93) has been denied at Special Term. The defendants-mortgagors, who offered no proof in opposition to the plaintiff's case, have been awarded a judgment dismissing the complaint upon the ground that the evidence presented by the plaintiff-mortgagee failed to establish a cause of action.

Coming to us by direct appeal on constitutional grounds (Civ. Prac. Act S. 588 subd. 4), the case presents the question whether the undisputed facts of record afford a valid basis for the legislative finding upon which the challenged statute rests, viz., that the public emergency, which existed in 1933—at the time of the enactment of section 1077-a of the Civil Practice Act (L. 1933, ch. 793)—continued and still constituted a public emergency on March 11, 1943, when chapter 93 of the Laws of 1943 became a law.

By the 1933 Mortgage Moratorium Law (L. 1933, ch. 793) the Legislature declared "* * * that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of income by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity of legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred and thirty-four, is hereby declared as a matter of legislative determination". Then follow the moratory provisions which, during the emergency thus declared, suspended the maintenance of certain foreclosure actions and related actions there defined.

Thereafter, in each of the ten succeeding years (except in one instance where the extension was for two years (L. 1941, ch. 782, S. 1) the Legislature extended for a single year the moratory provisions of the 1933 Act, each renewal being based upon a finding that the serious public emergency declared to exist in 1933 had "continued" and was "still existing."

We come then to the statute here called into question (L. 1943, ch. 93) as to which it is important to note, as in

the nine preceding similar laws, the public emergency assigned as the reason for the mortgage moratorium legislation was not some new or different form of abnormality in "economic and financial processes" affecting public welfare within the State. The reason for each succeeding enactment was the same and is typically expressed in the legislative finding within section 1 of chapter 93 of the Laws of 1943 with which we are now concerned and which provides in part: "Section 1. The serious public emergency, which existed at the time of the enactment of Section VJ77-a * * * of the Civil Practice Act as added by Chapter 793 of the Laws of 1933 * * * having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters * * * shall, notwithstanding any provision of such chapter, remain in full force and effect until July 1, 1944 * * *." (Emphasis supplied)

Although we hold in proper respect the declaration by the Legislature that the same public emergency which called forth moratorium legislation in 1933 still existed in 1943, that declaration is not conclusive. "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." (Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 422.) "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." (Chastleton Corp. v. Sinclair (per Holmes, J.), 264 U. S. 543, 547-8.) In a prior case which dealt with emergency legislation the same jurist had written—"A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (Block v. Hirsh, 256 U. S. 135, 157; see, also, Klinke v. Samuels, 264 N. Y. 144, 149; Matter of People (Title & Mtg. Guar. Co.), 264 N. Y. 69, 95-6.

Here the basis of the appellant's challenge to the 1943 Moratorium Law is the clause of the Federal Constitution (art. 1, S. 10) which forbids enactment by a State of a law impairing a contract obligation. It is not denied that in the public emergency which concededly existed in 1933 the moratorium legislation of that year was a valid exercise of

the State's essential reserved power and that the temporary suspension of foreclosure rights possessed by mortgagees was then opposite to emergency relief. "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. * * * 'the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power * * * is paramount to any rights under contracts between individuals.'" (Hughes, Ch. J., writing in Home Bldg. & Loan Assn. v. Blaisdell, supra, pp. 437, 439.) Accepting that rule as a statement of an appropriate and necessary principle of government, the appellant asserts that the exigency which fully warranted the enactment of the Moratorium Law of 1933 did not continue into the tenth year thereafter to afford a legal basis for the enactment of the 1943 statute. The appellant's submission is that the invalidity of chapter 93 of the laws of 1943 is established by the record before us which is said to contain undisputed proof that the emergency of 1933 which concededly warranted the temporary suspension of the exercise by the appellant of its contract rights as a mortgagee, has not "continued" and was not "still existing" in 1943 when the Moratorium Law here in question became effective. If so, the judgment before us for review must be reversed. I pass to a consideration of the evidence.

Among the economic factors existing in 1933 which the Legislature found warranted the moratorium legislation of that year, was "the curtailment of incomes by unemployment." As to that factor the present record shows that between 1933 and 1943 there was in the State of New York an increase of 92½% in the number of wage earners employed and an increase of 266% in weekly pay rolls. In 1933 the average weekly earnings of employees was $21.90; in 1943 that average had increased 103.7% to $44.68. In 1933 the actual number of workers employed in manufacturing was 323,071; in 1943 that number had increased to 735,265.

Other exigent factors found and declared by the Legislature to exist in 1933 were an "abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state . . . ." The fact is within our judicial knowledge that the banks of the nation had been closed by a Federal Executive Order in 1933. In that year the Superintendent of Banks reported a shortage of currency in the State. At the close of that year his report stated—"Attention was at once centered upon plans for the issuance of scrip. And on March 6, 1933, the Governor asked the Legislature for an act authorizing the creation of a State-wide corporation to serve this purpose. Such a bill was passed immediately and the plans for the issuance of scrip against bank deposits moved swiftly forward and were not abandoned until it was definitely known that the National Government was prepared to offer a solution." That report speaks of conditions at or about the time of the "bank holiday" of 1933, nearly six months prior to the enactment of the 1933 Moratorium Law. The record shows however—on the question of improvement in general financial conditions within the State—that on December 31, 1935, the amount of demand and time deposits in all banks—in both commercial and savings banks—aggregated 13.2 billion dollars; on June 30, 1943, the total of those types of deposits had increased to 25.7 billion dollars, an increase of 95% and a maximum for all time. In 1933 the savings banks of the State lost 7.54% of their deposits; in 1943 the savings banks gained 8.57%. In 1933 savings bank depositors withdrew $392,000,000 more than they deposited; in 1943 the same type of depositors placed in savings banks five hundred million dollars more than they withdrew. In 1933 the total amount of money in the nation was $45.49 per capita; in February, 1944 the amount of money in circulation was $151.22 per capita—an increase of more than three times the per capita figure of 1933. In 1933 the aggregate amount of money in circulation in the nation was $5,720,764,000; on February 29, 1944 that aggregate figure had increased to $20,823,568,000.

The Moratorium Law of 1933 also mentions as a factor prompting the legislation of that year the existence

of an "abnormal deflation of real property values." Upon that subject the evidence is that between 1933 and 1944 there was a sharp decline in housing vacancies in the six largest cities of the State. It also appears that in those six cities for the year 1933 the average tax delinquency was 17.3% of the total taxes levied; in 1942 that average was 4.8%. There is evidence that on January 1, 1944 the savings banks of the State had available for new investment in real estate mortgages under section 235, paragraph 6 (d) of the Banking Law a sum in excess of one billion dollars. There is also the significant item of evidence that in 1943 the savings banks loaned on mortgages covering property outside the State—in Pennsylvania, New Jersey and Connecticut—approximately one hundred million dollars. Upon the same subject there is also testimony by experts that in the metropolitan area of New York City there was an active real estate market in 1943 and that in that year money was readily available to refinance mortgages on buildings constructed prior to 1931.

The Moratorium Law of 1943, like the nine similar statutes which preceded it, was temporary in operation. It was limited to the exigency which called it forth and which the Legislature expressly declared to be the emergency of 1933, "continued" and "still existing" in 1943. The operation of the Moratorium Law of 1943 could not validly outlast the emergency which prompted its enactment. It could not be so extended as to suspend the contract rights of the appellant-mortgagee beyond that emergency. (See Home Bldg. & Loan Assn. v. Blaisdell, supra, p. 447.) The undisputed evidence to which reference has been made leads me to conclude that the emergency which caused the enactment of the Moratorium Law of 1933 was not "still existing" on March 11, 1943, when chapter 93 of the Laws of 1943 became a law. To adjudicate otherwise upon the evidence before us would be in disharmony with the constitutional limitation which the appellant rightly invokes. "Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined; and must be discharged in accordance with

the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." (Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 554.)

Accordingly I dissent and vote for reversal and the direction of judgment of foreclosure and sale in favor of the plaintiff.

Lehman, Ch. J., Loughran, Rippey, Conway, Desmond and Thacher, J. J., concur with Lehman, Ch. J., Lewis, J., dissents in opinion.

Judgment affirmed.